

## **NOTICE OF INTENT**

### **Department of State Elections Division**

#### **Procurement of Voting System Drayage and Storage (LAC 31:III.Chapter 1)**

Under the authority of R.S. 18:19 and 1371, R.S. 36:742, and in accordance with the provisions of the Administrative Procedures Act, R.S. 49:950 et seq. and the Louisiana Procurement Code, R.S. 39:1551 et seq., the secretary of state hereby gives notice of his intent to adopt uniform rules, regulations, forms, and instructions as to the procurement of voting system drayage and warehouse storage.

### **Title 31**

## **ELECTIONS**

### **Part III. Procurement**

#### **Chapter 1. Procurement of Voting System Drayage and Storage**

##### **§101. Definition**

*Drayage* means the transporting or cartage of voting equipment and supplies as directed by the secretary of state.

AUTHORITY NOTE: Promulgated in accordance with R.S. 18:1371 and R.S. 36:742.

HISTORICAL NOTE: Promulgated by the Department of State, Elections Division, LR 33:

##### **§103. Revised Statutes**

A. These regulations shall be read and interpreted jointly with R.S. 39:1551 et seq.

B. A rule or regulation shall not change any explicit contract provision, commitment, right or obligation of the state, or of a contractor under a state contract in existence on the effective date of that rule or regulation. However, to the extent possible, existing contracts shall be constructed in conformity with these rules and regulations.

C. The bid process for the storage of voting systems shall be performed by the Division of Administration, Office of Facility Planning and Control, except that the Department of State may negotiate for storage space of less than 5,000 square feet in accordance with the provisions of R.S. 18:19.

D. The Office of Facility Planning and Control shall prepare the lease between the department and lessor, and the purchase order shall be prepared by the department for the lease of warehouse storage facilities.

AUTHORITY NOTE: Promulgated in accordance with Article IV Section 12 of the Constitution, R.S. 18:19, 1353, 1382, R.S. 36:1643, and R.S. 39:1551 et seq.

HISTORICAL NOTE: Promulgated by the Department of State, Elections Division, LR 33:

**§105. Invitation for Drayage and Storage Bids, Public Notice, and Bid Opening**

A. All contracts for the drayage and storage of voting systems shall be awarded by competitive sealed bidding on a parish or regional basis.

B. If the secretary of state determines a bid will be awarded on a regional basis for drayage and storage, the criteria shall include but not necessarily be limited to:

1. not more than four parishes in a region;
2. not more than 1,000 voting systems in a region;
3. uniform beginning delivery time with continuous drayage for each parish in a region;
4. uniform beginning return time with continuous drayage for each parish in a region;
5. input will be solicited from each clerk of court affected to be included in a regional bid; and
6. a cost savings when bid on a regional basis.

C. Competitive sealed bidding shall be accomplished by sending out written notices to persons known to be able to provide the department's requirements, and by advertising in accordance with R.S. 18:19 and 1371 at least 30 days prior to bid opening.

1. Written notices shall be mailed to those persons who have previously requested an invitation for bids for said parish or parishes, if regional, within the previous four years. The written notices shall be mailed to any parish governing authority included in the bid to be let.

2. The written notices and advertisements shall announce:
  - a. the type of contract;
  - b. the parish or region for which the contract is required;
  - c. the method of acquiring an invitation for bids; and
  - d. the date, time, and place of bid opening.

3. Advertisements shall be published in the official journal of the state and in the official journal of the parish or parishes, if regional, for which the contract is required. Advertisements shall be published in a newspaper of general circulation printed in such parish or parishes, if regional, or, if there is no newspaper printed in such parish or parishes, if regional, in a newspaper printed in the nearest parish that has a general circulation in the parish or parishes, if regional, covered by the contract. The department may publish notices in additional journals for maximum coverage.

4. A notice shall be sent to the parish governing authority and the clerk of court of the parish or parishes, if regional, for which the contract is required. The clerk of court shall prominently post such notice in his office.

5. Notification shall also be made available on the department's election webpage at [www.GeauxVote.com](http://www.GeauxVote.com).

D. The invitation for bids shall contain:

1. complete description of the transportation required;
2. all applicable terms, conditions, and other requirements;
3. types and limits of insurance required;
4. bid and performance bonding requirements; and
5. factors which will be used to determine responsibility and suitability of bidders.

E. Bids shall be publicly opened and read as specified in the invitation for bids in the presence of one or more witnesses. Bidders and the public may be present at any bid opening.

AUTHORITY NOTE: Promulgated in accordance with R.S. 18:19 and 1371, R.S. 36:742, and R.S. 39:1594.

HISTORICAL NOTE: Promulgated by the Department of State, Elections Division, LR 33:

### **§113. Evaluation of Drayage and Storage Bids**

A. Drayage bids shall be evaluated based on adherence to the specifications, terms, conditions, and suitability requirements listed in the invitation for bids. The bidder must list any deviations from these specifications, terms, or conditions.

B. Storage bids shall be evaluated based on adherence to the detailed written response to all specifications, any submitted plans, inspection of the proposed site by the Department, or an authorized representative, quality, workmanship and suitability of the proposed site for the purposes set forth in the solicitation, including but not limited to the following:

1. location of the proposed space;
2. condition of the proposed site;
3. safety of the proposed site; and
4. timeliness of the availability.

C. The bidder must list any deviations from these specifications, terms or conditions.

AUTHORITY NOTE: Promulgated in accordance with R.S. 36:742 and 1594.

HISTORICAL NOTE: Promulgated by the Department of State, Elections Division, LR 33:

### **§115. Responsibility of Drayage and Storage Bidders**

A. The secretary of state or his designee may make reasonable inquiries to determine the responsibility of prospective contractors. In making his determination, the following factors will be considered:

1. has available the appropriate financial, material, equipment, and personnel resources and expertise, or the ability to obtain them, necessary to indicate the capability to meet all contractual requirements;
2. has a satisfactory record of performance on previous state contracts and with other persons;
3. is qualified legally to contract with the state of Louisiana (Prior to award of any contract, the successful bidder shall affirm by affidavit that he or she and/or the principal officers of a corporation are not currently under any felony conviction, or lesser charge on any election related matter); and
4. has reasonably supplied any information requested by the secretary of state in establishing responsibility.

B. Each bidder who is determined to be non-responsible shall be notified in writing. Such notification shall state all reasons for disqualification, and give each bidder who is proposed to be disqualified, a reasonable opportunity to refute the reasons for disqualification at an informal hearing.

AUTHORITY NOTE: Promulgated in accordance with R.S. 36:742 and R.S. 39:1601.

HISTORICAL NOTE: Promulgated by the Department of State, Elections Division, LR 33:

### **§117. Correction of Withdrawal of Drayage and Storage Bids**

A. Obvious errors or errors supported by clear and convincing evidence may be corrected, or bids may be withdrawn, if such correction or withdrawal does not prejudice other bidders and such actions may be taken only to the extent permitted under regulations.

1. Any bid may be withdrawn prior to bid opening.

2. Minor informalities or insignificant mistakes may be waived or corrected if such will not prejudice other bidders (i.e., if the effect on price, quantity, quality, delivery, or contractual conditions is not significant). The secretary of state may waive any informalities or allow corrections by bidders if it is in the best interest of the state of Louisiana.

AUTHORITY NOTE: Promulgated in accordance with R.S. 36:742 and R.S. 39:1594(F).

HISTORICAL NOTE: Promulgated by the Department of State, Elections Division, LR 33:

### **§119. Drayage Bid Guaranty and Bond**

A. If specified in the invitation for bids, a bond, certified check, or money order payable to the Department of State in the amount of five percent of the bid must accompany each bid submitted.

B. If a bidder withdraws his bid after bid opening, without complying with LAC 31:III.117, or fails to execute a contract within 20 days of request, the bid bond or other security shall be forfeited and deposited into the Department of the Treasury as income not available.

AUTHORITY NOTE: Promulgated in accordance with R.S. 18:1371, R.S. 36:742, and LAC 34:I.523.

HISTORICAL NOTE: Promulgated by the Department of State, Elections Division, LR 33:

### **§121. Drayage Performance Bond**

A. If specified in the invitation for bids, the bidder awarded the contract must submit a performance bond or letter of credit in the penal sum of one and one-half times the contract price made payable to the Department of State.

B. The performance bond shall be written by a surety or insurance company currently on the U.S. Department of the Treasury Financial Management Service list of approved bonding companies which is published annually in the *Federal Register*.

C. If a contractor fails to perform in accordance with contractual obligations, the contractor forfeits the performance bond.

AUTHORITY NOTE: Promulgated in accordance with R.S. 36:742, R.S. 38:2219, and R.S. 39:1581.

HISTORICAL NOTE: Promulgated by the Department of State, Elections Division, LR 33:

### **§123. Forfeiture of Bonds for Drayage**

A. Actions by bidders causing forfeiture of bonds as stated in §119 and §121 herein shall be cause for removal of said bidders from the department's bid list and will support a determination of non-responsibility for the bidder(s) and its principals for a period of three years.

AUTHORITY NOTE: Promulgated in accordance with R.S. 36:742 and R.S. 39:1581.

HISTORICAL NOTE: Promulgated by the Department of State, Elections Division, LR 33:

**§125. General Guaranty for Drayage**

A. Contractor agrees:

1. to maintain all insurance required in the invitation for bids during the term of the contract;
2. to pay all taxes, permits, licenses and fees;
3. to give all notices and comply with all laws, ordinances, rules and regulations of each city and/or town in the parish in which the contractor is performing his duties, and of the state of Louisiana;
4. to protect the state from loss in case of an accident or mishandling by contractor's employees; and
5. to make available the equipment, labor, insurance, etc. for drayage of voting machines at times other than for elections. Prices of the above mentioned to be negotiated between the contractor and department or to be determined by competitive bidding in accordance with small purchase provisions of the procurement code and subsequent applicable executive orders.

AUTHORITY NOTE: Promulgated in accordance with R.S. 36:742 and R.S. 39:1581.

HISTORICAL NOTE: Promulgated by the Department of State, Elections Division, LR 33:

**§127. Award of Drayage and Storage Contracts**

A. All contracts shall be awarded to the lowest responsive and responsible bidder within 30 days of bid opening, unless more time is needed by the department to investigate suitability and the bidder is notified accordingly.

1. A responsive bidder means a person who has submitted a bid which conforms in all substantive respects to the invitation for bids, including the specifications set forth in the invitation.

2. The award shall be made by unconditional acceptance of a bid without alteration or correction, except as authorized in §117.

B. If a bidder who is the lowest responsive and responsible bidder declines to accept the contract, the award may be made to the next lowest bidder or the solicitation may be canceled and re-advertised if it is determined to be in the best interest of the state. Any bidder who has declined to accept the contract previously offered shall be ineligible to bid on the subsequent solicitation. A bidder who declines a contract or fails to produce an acceptable performance bond may also be debarred from future bidding.

C. If a bidder who is the lowest bidder fails to meet all criteria as a responsive and/or responsible bidder, the award may be made to the next lowest bidder who meets all criteria as a responsive and responsible bidder or the solicitation may be canceled and re-advertised if it is determined to be in the best interest of the state.

D. In the case of "tie bids", award shall be made in a manner that will discourage future "tie bids". A written justification for the determination of award must be made by the secretary of state.

E. In-state bidders shall be preferred to out-of-state bidders on a reciprocal basis when there is a tie bid.

AUTHORITY NOTE: Promulgated in accordance with R.S. 36:742, R.S. 39:1594 and 1595.1.

HISTORICAL NOTE: Promulgated by the Department of State, Elections Division, LR 33:

**§129. Rejection of Drayage or Storage Bids; Cancellation of Drayage or Storage Solicitations**

A. The secretary of state reserves the right to reject any and all bids when it is in the best interest of the state of Louisiana.

1. Reasons for rejecting a bid include, but are not limited to:
  - a. a determination of none responsibility of a bidder(s); or
  - b. the bid is not responsive (i.e., it did not meet specifications or comply with terms and conditions).
2. Reasons for canceling a solicitation include, but are not limited to:
  - a. the department no longer requires the service;
  - b. bids received exceeded budgeted funds or were determined by the department to be unreasonable;
  - c. the solicitation was flawed (i.e., specifications were not complete or were ambiguous);
  - d. there is reason to believe that the bids received may have been collusive; or
  - e. there is inadequate competition indicated by low response to the solicitation.

B. When bids are rejected or a solicitation is canceled, written notices shall be given to the bidders, giving the reasons for the rejection or cancellation.

C. When a solicitation is canceled, where appropriate, bidders will be given the opportunity to bid on the new solicitation.

AUTHORITY NOTE: Promulgated in accordance with R.S. 36:742, R.S. 39:1581 and 1599.

HISTORICAL NOTE: Promulgated by the Department of State, Elections Division, LR 33:

**§131. Emergency Drayage Procurements**

A. The secretary of state or his designee may declare that an emergency situation exists when:

1. property is subject to loss or destruction as a result of an accident or natural disaster within 30 days of an election;
2. the functioning of the department will be threatened; or
3. the health and safety of any person is threatened.

B. Every effort shall be made to obtain bids from three or more bidders. Bids shall be solicited from bonded, insured draymen or lessors currently under contract with the department.

1. If time permits, written quotations shall be solicited.
2. If time does not permit, telephone quotations shall be solicited.

C. The secretary of state shall make a written determination stating the basis for the declaration of an emergency, the procedure used prior to selecting a contractor, and the basis for awarding to a particular contractor.

D. The secretary of state shall keep all records relating to emergency procurements at least three years after the Legislative Auditor's Office have completed their audit of the department for the fiscal year in question.

AUTHORITY NOTE: Promulgated in accordance with R.S. 36:742 and R.S. 39:1598.

HISTORICAL NOTE: Promulgated by the Department of State, Elections, LR 33:

### **§133. Collusive Bidding or Negotiations of Drayage or Storage Contracts**

A. The attorney general shall be notified in writing whenever collusion is suspected among bidders. Such notice shall contain all known facts.

B. All documents involved in a procurement in which collusion is suspected shall be retained for three years after the Legislative Auditor's Office have completed their audit of the department for the fiscal year in questions or until the attorney general notifies the department that they may be destroyed, whichever is longer. These documents shall be made available to the attorney general or his designee upon request.

AUTHORITY NOTE: Promulgated in accordance with R.S. 36:742 and R.S. 39:1626.

HISTORICAL NOTE: Promulgated by the Department of State, Elections Division, LR 33:

### **§135. Drayage and Storage Specifications**

A. All specifications shall be written so as to promote as much competition as possible.

AUTHORITY NOTE: Promulgated in accordance with R.S. 36:742 and R.S. 39:1581.

HISTORICAL NOTE: Promulgated by the Department of State, Elections Division, LR 33:

### **§141. Drayage Contract Requirements**

A. A contract cannot be transferred, subcontracted, or assigned prior to execution of said contract. After execution of the contract, a contractor may assign or subcontract his obligations under the contract only with the written consent of the secretary of state, which consent shall not be unreasonably withheld.

B. To the extent that a prospective contractor proposes to utilize subcontractors in performing the contract, the prospective prime contractor shall not be considered to be responsible unless recent performance history indicates an acceptable subcontracting system determined by the secretary of state. All subcontractors must meet the same standards for responsibility, bonds, and insurance as the prime contractor.

C. If a bidder is the lowest responsible and responsive bidder in more than one parish, bidders will be limited to contracting for parishes with an aggregate total of not more than 1,000 voting systems or four parishes. In the event that those numbers are exceeded, the contracts will be awarded in the order in which bids were taken.

D. The term of the contract shall be one year or less with an option to renew for two additional one-year terms. All contracts shall end on December 31.

E. If the holder of multiple drayage contracts fails to perform in accordance with the provisions of any of his contracts, the secretary of state may cancel any and all contracts with that contractor. In addition, the contractor may be suspended from future bidding.

AUTHORITY NOTE: Promulgated in accordance with R.S. 18:1371, R.S. 36:742 and R.S. 39:1581.

HISTORICAL NOTE: Promulgated by the Department of State, Elections Division, LR 33:

**§143. Right to Protest Drayage or Storage Contract Award**

A. All proceedings herewith shall be carried out in accordance with the Conduct of Hearing Rules set forth in LAC 34:I.Chapter 31.

B. Any bidder may protest a solicitation or an award of a contract to the secretary of state.

C. In regard to the solicitation of a drayage or storage contract, the protest must be made in writing at least two days prior to the opening of bids.

D. In regard to the award of any contract, a written protest must be made within 14 days after the contract is awarded.

AUTHORITY NOTE: Promulgated in accordance with R.S. 36:742 and R.S. 39:1671.

HISTORICAL NOTE: Promulgated by the Department of State, Elections Division, LR 33:

**§145. Legal and Contractual Remedies for Drayage and Storage of Voting Systems**

A. The secretary of state or his designee is authorized to settle and resolve any protest prior to court action. If a protest is not resolved by mutual agreement, the secretary of state or his designee shall, within 14 days, issue a decision in writing. The decision shall:

1. state the reasons for the action taken; and
2. inform the protestant of its right to administrative and judicial review as provided in Part VI of the Procurement Code.

B. Notice of decision shall be furnished immediately to the protestant and any other party intervening.

C. The decision of the secretary of state or his designee shall be final unless:

1. the decision is fraudulent; or
2. the person has appealed to the Commissioner of Administration in accordance with R.S. 39:1683 and R.S. 39:1685.

D. If a protest is lodged as provided for in these regulations, the department shall not proceed with the solicitation or award, unless the secretary of state declares in writing that proceeding is necessary to protect the substantial interest of the state. Upon such determination, no court shall enjoin progress under award except after notice and hearing.

E. When a protest is sustained and the protesting bidder should have been awarded the contract but is not, the bidder shall be reimbursed for reasonable costs associated with the solicitation, including bid preparation costs other than attorney's fees. Any administrative determination of such costs shall require approval of the attorney general.

AUTHORITY NOTE: Promulgated in accordance with R.S. 36:742, R.S. 39:1671, R.S. 18:1673 and R.S. 18:1685.

HISTORICAL NOTE: Promulgated by the Department of State, Elections Division, LR 33:

**§147. Suspension and Debarment of Drayage or Storage Contractor**

A. A bidder and its principal officers and agents may be debarred or suspended from consideration for award of contracts during an investigation for probable cause if it is in the best interests of the state.



B. The secretary of state may suspend or debar a person for cause after notice to the bidder has been given and the bidder has had a reasonable opportunity to respond. A bidder may be suspended if the secretary of state determines that there is probable cause to believe that the bidder has engaged in any activity to lead to debarment.

1. The period of time for the suspension of a drayage or storage contract shall be a minimum of one complete cycle of bidding in all parishes.

2. The period of time for debarment of a drayage or storage contract shall be a minimum of two complete cycles of bidding in all parishes.

C. Causes for debarment shall be determined in accordance with R.S. 39:1672(C).

D. In addition to the provisions of R.S. 39:1672(C), the secretary of state may debar a bidder for the following reasons:

1. the bidder has withdrawn a bid after an award, for whatever reason, more than once; or

2. the secretary of state may declare other specific reasons for suspension or debarment which is in the best interests of the state.

D. The secretary of state shall notify the debarred or suspended bidder in writing of the decision stating the reasons for the action taken and the amount of time of suspension or debarment. Such notification shall also inform the debarred or suspended bidder's rights to administrative and judicial review.

E. The decision of the secretary of state or his designee shall be final unless:

1. the decision is fraudulent; or

2. the person has appealed to the commissioner of administration in accordance with R.S. 39:1684.

AUTHORITY NOTE: Promulgated in accordance with R.S. 36:742 and R.S. 39:1672.

HISTORICAL NOTE: Promulgated by the Department of State, Elections Division, LR 33:

#### **§149. Repeal Prior Rules and Regulations**

A. All rules and regulations on voting machine drayage and storage that were previously adopted by the Department of Elections and Registration are hereby repealed in their entirety.

AUTHORITY NOTE: Promulgated in accordance with R.S. 36:742.

HISTORICAL NOTE: Promulgated by the Department of State, Elections Division, LR 33:

#### **Family Impact Statement**

The proposed Rule LAC 31:III.Chapter 1 regarding procurement of voting system drayage and warehouse storage should not have any known or foreseeable impact on any family as defined by R.S. 49:972D or on family formation, stability, and autonomy. Specifically, there should be no known or foreseeable effect on:

1. the stability of the family;
2. the authority and rights of parents regarding the education and supervision of their children;
3. the functioning of the family;
4. family earnings and family budget;
5. the behavior and personal responsibility of children; and

6. the ability of the family or a local government to perform the function as contained in the proposed Rule.

Interested persons may submit written comments to Angie Rogers LaPlace, Commissioner of Elections, Department of State, P. O. Box 94125, Baton Rouge, LA 70804-9125. She will be responsible for responding to inquiries regarding this proposed Rule. A public hearing on this proposed Rule is scheduled for Wednesday, July 25, 2007 at 10 a.m. in the Broadwing Building, Auditorium, 1<sup>st</sup> Floor at the rear of the building, 8549 United Plaza Blvd., Baton Rouge, LA. At that time, all interested persons will be afforded an opportunity to submit data, views, or arguments either orally or in writing. The deadline for the department to receive written comments is 4:30 p.m. on July 26, 2007 after the public hearing.

Jay Dardenne  
Secretary of State